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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9243 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

KALPESH GOPALDAS PATEL

Versus

STATE OF GUJARAT

Appearance:

MS KD PARMAR for Petitioner

MR UR BHATT ADDL.GOVERNMENT PLEADER for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 03/04/98

ORAL JUDGEMENT

The petitioner has been arrested and is kept under detention, passing the order of detention dt. 24th September, 1997 by the Police Commissioner for the City of Ahmedabad. The petitioner, therefore, by this application under Art. 226 of Constitution of India, assails the legality and validity of the impugned order passed under Sec.3 of the Gujarat Prevention of

Anti-Social Activities Act (for short the 'Act').

2. The petitioner was carrying out several criminal activities. He was,therefore,a terror for the people. The people were feeling insecured. The Police Commissioner had come to know about petitioner's activities. He studied several records available in different Police Stations. He could see that about seven complaints were lodged against the petitioner with Sabarmati, Maninagar and Satellite Police Stations. All the complaints were of the offences punishable under Sec. 379 of I.P.Code. As alleged in those complaints, the petitioner had committed theft of scooter, motor cycle and other vehicle. The Police Commissioner then thought it fit to record the statements of different persons, but no one was ready to come forward and make a statement or lodge the complaint against the petitioner. The petitioner was considered to be the dangerous person i.e. a tartar and decimetor. Every one was thinking that if he would help the Police by giving the statement, he would have to face dire consequence or perhaps would be no more. After great pursuation thereafter and when assurance was given that their particulars disclosing their identity would be kept secret, some of the persons showed their willingness to give statement. From the statements of those persons, the Police Commissioner was shocked to know that subversive and nefarious activities of the petitioner disturbing the public order and safety of the people were going berserk. To make the people feel free and maintain public order, stern action against the petitioner was found necessary, but after careful study, the Police Commissioner realised that any action, if taken under general law sounding dull would yield no result. He therefore thought it fit to pass the impugned order which was the only way out to curb the anti-social activities of the petitioner. He then passed the order in question, pursuant to which the petitioner is at present kept under detention. He now challenges the legality and validity of that order in question.

3. The impugned order is challenged on several grounds but at the time of hearing, the learned advocates representing the parties tapered off their submissions, confining to the only point namely exercise of privilege under Sec. 9(2) of the Act. According to the learned advocate representing the petitioner, the particulars about the witnesses are suppressed. As the same are not furnished to the petitioner effective representation could not be made. Had the same being given, the petitioner could have pointed out whether those statements were reliable or why those persons were making

the statements against him. When the right to make effective representation was thus impaired, the order of detention may be held illegal.

4. In reply to such contention, Mr. Kamal Mehta, learned APP has submitted that considering all relevant factors and materials before him, the Police Commissioner was satisfied that the particulars about witnesses were required to be suppressed so as to protect the lives of the witnesses. When accordingly, in the public interest, the particulars were not furnished, the privilege under Sec.9(2) of the Act was rightly exercised and there is no reason to upset the order on that ground.

5. It would be better if the law about the non-disclosure of certain facts is elucidated. Reading Article 22(5) of the Constitution of India, what becomes clear is that the grounds on which order of detention is passed are required to be communicated to the detenu. The detenu is, therefore, required to be informed not merely factual inference and factual material which led to inference namely not to disclose certain facts but also the sources from which the factual material is gathered. The disclosure of sources can enable the detenu to draw the attention of the detaining authority in the course of his representation to the fact whether the factual material collected from such sources would be relied upon and used against him on the facts and circumstances of the case. Subject to the limitation mentioned in Article 22(6) of the Constitution of India and Section 9(2) of the Act, the detaining authority is of course empowered to withhold such facts and particulars, the disclosure of which he considers to be against the public interest. The privilege of non-disclosure has to be exercised sparingly and in those cases, where public interest dictating non-disclosure overrides the public interest requiring disclosure. Hence the detaining authority must be fully satisfied on the basis of overall study that the apprehension expressed by the informant is honest, genuine and reasonable in the circumstances of the case. With a view to satisfy itself whether the fear of violence and consequential feelings of insecurity or apprehension of a wrong would be done to them at any time by the detenu by those making statement against the detenu is imaginary or fanciful; or an empty excuse or well-founded for disclosing or not disclosing certain facts or particulars of those persons, the authority making the order has to make necessary inquiry applying his mind. What can be deduced from such constitutional as well as legal scheme whereunder obligation to furnish the grounds and the duty

to consider whether the disclosure of any facts involved therein is against public interest are both vested in the detaining authority and not in any other. The authority passing the order of detention has to apply his mind and should itself be satisfied to the question whether or not the supply of the relevant particulars and materials would be injurious to the public interest. If the task of recording statements and necessary inquiry is entrusted to others, and if he mechanically endorses or accepts the recommendation of others or subordinate authority in that behalf without applying mind and taking his own decision, the exercise of power would be vitiated as arbitrary. What is further required is that the detaining authority must file his affidavit to satisfy the court that he had sincerely and honestly applied the mind for the bonafide exercise of the powers about disclosure and privilege regarding non-disclosure so that the court can examine rational connection between the ground disclosed or not disclosed in public interest. If no affidavit explaining the exercise of the power is filed, the court can infer against the detaining authority. If the affidavit is filed explaining the exercise of the power, the detenu may challenge the privilege exercised on the ground that the same is vitiated by factual or legal malafides. For my such view, a reference to a decision in the case of Bai Amina, W/o. Ibrahim Abdul Rahim Alla Vs. State of Gujarat and others- 22 G.L.R. 1186 held to be the good law by the Full Bench of this Court in the case of Chandrakant N. Patel Vs. State of Gujarat & Others 35(1) [1994(1)] G.L.R. 761, may be made.

6. In view of such law, it was incumbent upon the Commissioner of Police to file the affidavit and satisfy the court that it was absolutely necessary in the public interest to suppress the particulars about witnesses keeping their safety in mind. It is pertinent to note that the affidavit justifying the exercise of privilege in the circumstances of the case, is not filed. When that is so, it should be assumed that without any just cause, the particulars were suppressed. As the particulars were not given, naturally the petitioner could not know, what defence he should take, what was the reason to state against the petitioner by those persons and whether any of those witnesses really stated so or whether they were really in existence. Thus, the right to make effective representation of the petitioner is jeopardised. Further for want of explanatory affidavit, it can be said that there was no just cause for being personally satisfied applying the mind for exercising the privilege. The requirement of Sec.9(2) of the Act are

therefore not satisfied. It should, therefore, be held that the privilege exercised is not in consonance with law. The continued detention of the petitioner is, therefore, unconstitutional and illegal and the order of detention being bad in law is required to be struck down.

7. For the aforesaid reasons, this petition is allowed. The order of detention dt. 24th September, 1997 by the Police Commissioner for the City of Ahmedabad, is hereby quashed and set aside, and the petitioner-detenu is ordered to be set at liberty forth with, if not required in any other case. Rule accordingly made absolute.

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